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Supreme Court of the United States.

OCTOBER TERM, 1904.

Nos. 113, 114.

No. 113

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., ... *Appellants,*

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, ... *Appellee.*

No. 114

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, ... *Appellant,*

vs.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., ... *Appellees.*

BRIEF FOR FIRST NATIONAL BANK.

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For First National Bank.

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STATEMENT.

These appeals are from a decree of the Circuit Court of the United States, Eastern District of Kentucky.

The city's and its assessor's petition and assignment of errors are found, *Rec., pp. 101, 104,* and the bank's petition and assignment of errors, *pp. 107, 108.*

The decree appealed from was entered on June 16, 1903, *Rec. pp. 102, 103.*

The bank filed its bill of complaint against the city and its assessor July 23, 1900, (*Rec., p. 1*), which, by permission, was amended on August 14, 1900 (*Rec, p. 33*), seeking to enjoin the city and its officers from assessing or attempting to collect taxes on the shares of the capital stock of the bank, for the years from 1893 to 1900, both inclusive, and from arresting the bank's president and cashier, as threatened, for not listing such shares of stock for assessment,

and for an adjudication whether such shares of stock were subject to taxation by the State before November 17, 1904, the time of the expiration of the bank's charter.

As an exhibit with the bill is filed the bank's acceptance of the "Hewitt Law," hereinafter explained (*Rec. pp. 15, 22*); and the record from the Campbell Circuit Court in the bank v. The City, wherein the contract between the bank and the State, providing the sole method of the bank's taxation, was adjudicated. (*Rec., p. 15.*)

The city and its assessor demurred generally to the bill, and the answer filed was stricken from the record, so that every allegation of the bill is confessed. It is accordingly admitted of record, that appellant bank is a National bank, incorporated November 17, 1884, for the term of twenty years, ending November 17, 1904, located always in Covington, Kentucky. That in December, 1886, the legislature of Kentucky enacted the "Hewitt Law" for the taxation of all banks in Kentucky, and provided for a contract between the State and the banks, State and National, stipulating:

> "That shares of stock in State and National banks * * * shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

Further:

> "That nothing herein contained shall be construed as exempting from taxation for county or

municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of said act provided:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky, shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock, shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

That the bank, on June 22, 1887, within the time allowed, filed with the governor the required acceptance of act: That its cashier, on July 1st of each year thereafter, including 1900, filed with the State Auditor the statement required by *Section 2* of the act, and the bank has paid the tax of *seventy-five cents* on each share of its stock, as provided in said act, to the State of Kentucky for every year including 1900, and to date so far as anything appears in this record to show the contrary, which tax the State accepted and has retained. It has, also, every year paid to the city of Covington taxes for municipal purposes assessed by said city on its banking building:

That the contract between the State and the bank, when

made, was authorized by the State Constitution. The State, however, on *September 28, 1891*, adopted a new Constitution, inconsistent with such contract or the law authorizing it:

That in 1892, five years after the contract aforesaid was made, the Legislature enacted the Revenue Law of the State, providing, among other things, that each bank should pay a franchise tax, which, as construed by the highest court of Kentucky and by this court, included the entire value of the bank's capital stock, surplus, etc., less the assessed value of its tangible property, otherwise taxed. *Citizens, etc., Bank v. Owensboro, 173, U. S., 636:*

That pursuant to the new legislation appellant bank's property was so assessed for the year 1893 for taxation by the appellant city, the tax being denominated a "franchise tax." The bank insisted that its aforesaid contract with the State, made in June, 1887, under the Hewitt Law was irrevocable, and that all of its property, other than its banking building was exempt from any taxation by appellant city before November 17, 1904, the termination of its corporate existence, and the city contended that such contract had been abrogated by the act of 1892, and that the bank's shares of stock and property were subject to taxation for municipal purposes, and that it could collect the tax assessed for 1893, called a "franchise tax," and threatened to distrain the bank's property therefor; whereupon, the bank filed in the Kenton Circuit Court its petition against said city, alleging its contract under the Hewitt Law, and its compliance therewith ever thereafter; the attempted repeal of said law by the State in 1892, assailing the attempt as an impairment of the obligation of its contract with the State, and praying an injunction restraining the city from collecting, or attempting to collect said tax for said year 1893; and the judge of the court declining to sit by reason of personal interest in the result, the case, by agreement, was transferred to the Campbell Circuit

Court, a court of like jurisdiction with the Kenton Circuit Court. The city demurred to the bank's petition, its demurrer was overruled, the facts being correctly averred in the petition it declined to answer, and, thereupon, the court adjudged that the contract aforesaid between the State and the bank, exempting its shares of stock from any local taxation whatever, was irrevocable during the corporate existence of the bank, and the injunction as prayed was granted: (*Rec., p. 27.*)

That from the judgment, the city appealed to the Court of Appeals of Kentucky, which affirmed said judgment, specifically and unequivocally adjudging the existence and irrevocability of the contract aforesaid, and that by reason thereof all the property of the bank, other than its banking building, and all of its shares of capital stock, were exempt from taxation by said city during the corporate existence of the bank. Appellant bank has complied with said adjudged contract ever since:

That on *March 21, 1900,* the Kentucky legislature enacted the law now in controversy. That this act attempted to authorize the assessment, for both State and municipal purposes, of stock of National banks for each and every year since *1892, and to make the bank liable for the tax.*

That appellant bank's capital stock during *1893, 1894, 1895, and 1896,* and until *July 1, 1897,* was $600,000.00, and upon that day it was diminished to $300,000.00, and said bank then paid to the persons then holding its shares of stock $300,000.00 in money. That from *1893* to the *institution of this action,* many of the shares of the bank's stock had changed ownership, many being transferred, and many having passed upon the death of the holders thereof to personal representatives, and been distributed among distributees, or sold to pay decedent's debts, and that many of said shareholders from time to time were non-residents of Kentucky, some selling and transferring

their stock, others becoming insolvent, so that their stock passed in payment of indebtedness.

That in *May, 1900*, appellant, Middendorf, the city's assessor, demanded of the appellant bank that it list with him for taxation by said city for all the years from *1893 to 1900*, both inclusive, all the shares of its capital stock, in response whereto said bank's Board of Directors adopted a resolution, directing its president and cashier not to make the list demanded, for the reason that such shares were not subject to taxation by said city, and that it had been accordingly so adjudged. (*Exhibit C, Rec., p. 29.*) That said assessor then served on the president, a written notice to list with him said shares for taxation for all of said years (*Exhibit D, Rec., p. 29*), and upon the bank's refusal said assessor and city threatened to and were about to procure the arrest and punishment of said president and cashier, to compel by process of contempt from the police court of said city, the listing of such shares for taxation as aforesaid, the power so to proceed being claimed under Kentucky Statutes governing *cities of the second* class, and especially *Sec. 3179, Ky. Stats.* (*Rec., p. 11.*)

That after the Act of March 21, 1900, became effective, *to-wit* in *July, 1900*, the date for payment of the bank's taxes under its contract of June, 1887, the State of Kentucky collected from and still retains the tax provided for in said contract. (*Rec., p. 5.*)

That the bank's bill of complaint averred the facts aforesaid, and exhibited a complete transcript of the record in the action aforesaid in the Campbell Circuit Court, and upon consideration thereof, the court below granted the bank an injunction *pendente lite*, restraining the city and its assessor from making, either against the bank or any holder of its shares of capital stock, any assessment or levy of any tax upon said shares of stock for any purpose for any time previously to *March 21, 1900*, and, also, from collecting any tax upon such shares upon any assess-

ment or levy for any time subsequently to said date, but provided that said defendants were left at liberty to make assessments of said shares for taxation for any time or period after *March 21, 1900*, provided that they made no collection of the taxes so assessed until said court should have determined from the evidence whether the taxes so assessed were at a higher rate than permitted by law, and to what extent (*Rec., p. 62*). Afterward, to-wit, on *December 17, 1900*, the parties entered into a stipulation (*Rec., p. 63*) and thereupon the case was submitted as upon final hearing, and a decree entered (*Rec., p. 65*). Said decree disallowed the plea to the jurisdiction of the court; and overruled the demurrer to the bill, and perpetuated the preliminary injunction.

Said court retained control of said case, and on *January 7, 1901* (*Rec., p. 67*) the city and its assessor appealed to this court, which dismissed the appeal as premature, *185 U. S., 270* (*Rec., p. 73*).

Afterward, *to-wit, on April 28, 1902*, this court's mandate was filed and the case redocketed (*Rec., p. 71*), and on *June 3, 1902*, the city and its assessor moved for a modification of the aforesaid injunction, restraining the assessment for any time previously to March 21, 1900 (*Rec., p. 71*); and on *July 7, 1903*, the city and its assessor filed an answer, asserting that all the stock of the bank was taxable from *1893 to 1902*, both inclusive, for State and local purposes, asserting its proposed assessment of all the shares of the bank's stock, etc. (Rec., p. 79). Said answer was subsequently stricken from the files (*Rec., p. 84*). Afterward, *to-wit, on May 19, 1903*, the court filed its opinion (*Rec., p. 88*), and entered its decree (*Rec., p. 102*), adjudging that the bank's bill of complaint be dismissed as to tax assessable and collectible *subsequently to March 21, 1900*, and reaffirming and perpetuating the previous injunction against the assessment or collection of

taxes for the time *previously to March 21, 1900* (*Rec., p. 102*). From this decree both parties appealed. (*Rec., pp. 103, 107.*)

ASSIGNMENT OF ERRORS.

The bank's assignment of errors is as follows:

First; In dismissing its bill of complaint in so far as it sought to enjoin the assessment and collection of taxes *subsequently to March 21, 1900.*

Secondly; In refusing to perpetuate the temporary injunction covering the full period of the bank's corporate existence.

Thirdly; In failing to adjudge that the bank had an irrevocable contract with the State upon the continued compliance by it with the provisions of the act of *May 17, 1886,* whereby no tax for municipal purposes could be exacted from it based upon the shares of its capital stock, or upon any of its property except its real estate and banking building during its corporate existence, *to-wit, until November 17,1904, inclusive.*

Fourthly; In failing and refusing to declare the act of the Kentucky legislature of *March 21, 1900,* in so far as it attempted to impair the validity of the bank's contract, to be null and void.

Fifthly; In failing and refusing to adjudge that the contract between the State and the bank was *res judicata,* and that the State and city were estopped to claim or assert that the bank had not such irrevocable contract.

ARGUMENT.

The very elaborate and able brief filed upon the previous appeal, by James W. Bryan, since deceased, presents an excellent argument of the questions presented by this record.

The points for argument here are:

1. That the Act of March *21, 1900*, so far as it is retroactive, infringes the *Fourteenth Amendment* to the Federal Constitution, in taking the property of the bank and its shareholders without due process, and denying it the equal protection of the laws; and so far as it authorizes the assessment and taxation either previously or subsequently to March 21, 1900, discriminates against National banks and their shareholders, and offends *section 5219* of the Revised Statutes of the United States.

2. The effect as *res judicata vel non* of the judgment of the Campbell Circuit Court aforesaid affirmed by the Kentucky Court of Appeals, adjudicating the irrevocability of the contract between the bank and the State under the "Hewitt" Law.

I.

The opinion of the circuit judge (*Rec., p.53*) is lucid and convincing. After quoting the statutes involved, he recites that in extreme cases, a legitimate, retroactive imposition of taxes upon property not hitherto subject to taxation may be possible, but that the case must be rare and one approaching extremely near infraction of the Federal Constitution forbidding private property being taken for public use, without just compensation, and as a very serious objection to such taxation, he instances the possibility of confiscation under such a doctrine, if property for fifty years may be retrospectively assessed, when previously exempt. He notes that curative legislation is admissible to reach omitted property, and property escaping tax-

ation because of formal irregularities, but that as to national bank shares prior to March, 1900, there was no legislation for their taxation. He says:

> "Any attempt to give it the appearance of being a curative statute is merely nominal and colorable, and can not be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover it imposes a tax upon national bank shares alone, and the retroactive feature of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid, and now pay, only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that 'upon real estate,' which rate might not comply with section 5219 of the Revised Statutes, unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax."

On the retroactive feature of taxation, the proposition is to substitute, *in March, 1900*, the liability of the shareholders of the bank during the preceding eight years for the non-liability of the bank under the *act of 1892* putting a tax on its franchise, and this is termed taxing property already taxable simply by providing a new method therefor, and not taxing property hitherto not taxed, or not taxable. In the meanwhile, *i. e.*, from *1892 to 1900*, the bank had paid taxes under its contract made in *1887* under the provisions of the *"Hewitt Law" of 1886*, ad-

judged by the highest court of the State to be irrevocable. Exactly upon what grounds the liability of the shareholders for the past years might be substituted for the bank's non-liability for those years, the departments of the State government are not agreed. The highest State court holds (*Commonwealth v. Citizens National Bank, 25 K. L. R., 2100, April 15, 1904, Citizens' National Bank v. Commonwealth, Ib. 2254, April 27, 1904*), that under the act of *March 21, 1900*, the sheriff may cause the shares to be assessed pursuant to the provisions of *Sec. 4241, Ky. Stats.* as *omitted* property, the shares having been adjudged, in *Scobee v. Bean, 109 Ky., 526*, to have been assessable to the shareholders of the bank under the Act of 1892, the *Act of March 21, 1900*, therefore not making assessable what was not theretofore assessable, but merely providing another mode for its assessment. But while the court is holding the shareholder to have been assessable ever since *1892*, the legislature in its preamble to the Act of *March 21, 1900*, is reciting that whereas this court has held void the act providing franchise taxation of national banks, in consequence whereof there had been since *1892* no adequate mode of "taxing national banks, while State banks are now and have been ever since 1892 taxable for all purposes, State and local," therefore the necessity of the act. The emergency clause recites:

> "Whereas it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

So we have the court holding the shareholders assessable upon their stock during the entire period from *1892 to 1900*, while the legislature has recited as a reason for the passage of the Act of *March 21, 1900*, that the decision of this court in *April, 1899*, has avoided the only statutory provision for adequate taxation of National banks, and

that it is important that they should be *taxed equally with State banks.*

To a comprehension of the situation an acquaintance with *Scobee v. Bean* is necessary. In that case the assessor of Clark county in *September, 1899*, this court having held void on *April 3, 1899*, the *Act of 1892* taxing the bank's franchise, assessed for taxation against the owners thereof, certain shares in a national bank, and when the sheriff was about to collect the tax so assessed, an injunction was sought by the shareholders. The injunction was granted by the Circuit Court, but denied by the appellate court. The logic of the latter's decision is that this court held void the Act of 1892 assuming to assess the national bank's franchise, and the bank thereupon became one of those corporations whose stock is "not paid on by the company or association" (whatever that may mean) and therefore, taxable to the shareholder under sections *4050 and 4058*, providing for the payment by the shareholder of taxes on "the amount of stock in joint stock companies or associations not paid on by the company or the association." The shareholders' stock is in said case also said to be included under "Miscellaneous" "(74) value of all property not mentioned above." Accordingly, it is held in *Commonwealth v. Citizens' National Bank and Citizens' National Bank v. Commonwealth, supra*, that the sheriff may, under the Act of *March 21, 1900*, assess *the bank* on the shares of its shareholders for back taxes for all years since *1892*, and *20 per cent.* penalties upon the tax for each of said years, although *between 1892 and 1900* no law existed for the assessment of the stock of National banks, except the Act of 1892 assuming to assess the franchise of said banks.

To one familiar with the situation, it is difficult to believe that had the shareholder, between 1892 and the date of this court's decision, in April, 1899, offered to pay taxes on his stock in lieu of the franchise tax assessable under

the Act of 1892 on the bank, his proposition would have been scouted. Nevertheless, upon the assumption of his continued liability during all of said period, the *Bank* is declared liable for penalties of *20 per cent.* upon the tax for each year of said time for the stockholders' failure (or the bank's failure, we do not know which) to pay some tax, either that on the shares of the shareholder, or that upon the franchise of the bank.

That the doctrine of the bank cases of *April 15, 1904*, and *April 27, 1904*, is unsound, is apparent upon the slightest consideration. It is based upon the assumption that the Act of *March 21, 1900*, only provides another mode for assessing what was already assessable, viz., the shares in the hands of the shareholders, and not for taxing what was previously not taxable.

As aforesaid, the court adjudges the liability of the shareholder upon the assumption that the national bank by this Court's decision has become one of those corporations which have not paid taxes on their property and whose shareholders are, therefore, taxable upon the value of their shares as upon their other personal property. This decision is based upon a review of Sections *4020, 4022, 4047, 4050, 4052, 4058, 4085, and 4088.*

If it were material so to do, it could be shown by a review of the statutes that the decision is unsound. The evident meaning of the statutes is not that the shareholders shall be assessed wherever the corporation fails to pay its taxes, for this would contemplate a retrospective assessment, it being impossible to know until the corporations' taxes were due whether or not they would be paid, but the meaning of the statutes is that the shareholders shall be liable when the corporations, under the provisions of the Revenue Law of which the sections relied on are a part, are not liable for taxes upon their property. This is apparent from the language of section 4088, *viz.:*

> "Sec. 4088: The individual stockholders of the corporations which are by this article required to report and pay taxes upon their corporate franchise shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided."

The statute must be construed as prospective and not retrospective and as contemplating the validity and not the nullity of any of its provisions. The liability, therefore, of shareholders in those corporations not paying taxes upon their property which is imposed by *section 4058* was not intended to reach shareholders of national banks.

Assuming, however, *Scobee v. Bean,* a correct exposition of the statutory law of Kentucky, how can its doctrine avail for the retrospective assessment of the shares of the shareholders of National banks under the Act of March 21, 1900, when the shares of resident holders only could have been assessable from *1892 to 1900* under the doctrine of that decision and all the holders, non-resident as well as resident, of the shares of national banks are now assessed under the *Act of 1900* and the *bank* made directly liable for the taxes upon all such shares. If only resident holders were liable to tax in Kentucky upon their personal property, how can it be said that the bank's liability under the Act of March 21, 1900, for the tax upon all of its shares as well those owned by non-residents as by residents, amounts simply to a new method of taxing what was previously taxable? Certainly residents of New York or other States were not liable to taxation in Kentucky under sections *4020 and other sections,* which are the basis of the decision in *Scobee v. Bean,* nevertheless the bank is by the Act of March 21, 1900, made liable for the taxes of those non-residents upon their personal property, *to-wit,* shares of stock, and it is said that this is to tax what has always been taxable. The shareholders for any year

from *1892 to 1900* may have been non-residents, and for any other year principally residents, nevertheless this fact is made immaterial by the decision in *Commonwealth v. Citizens' Nat'l Bank and Citizens' Nat'l Bank v. Commonwealth,* and by the *Act of March 21, 1900,* requiring the bank to list the shares of all its shareholders and pay the tax on all such shares. Sec. 4020 aforesaid provides:

> "All real and personal estate within this State and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereafter provided shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale."

The Kentucky Court in *Baldwin v. Shine, 84 Ky., 502 (1886)* said *(p. 512):*

> "It is true that debts have no place independent of the domicile of the owner. While specific articles of personal property permanently located in this State, and belonging to non-residents, may be listed even to the possessor, yet evidences of indebtedness have no actual *situs* here, and must be treated as located with the non-resident owner; but that case is not this one," &c.

In *Lexington v. Fishback's Trustee, 109 Ky., 770,* the court held that the residence of the *equitable* owner was the *situs for* taxation of personal property.

In *Frankfort v. Fidelity Trust &c., Co., 111 Ky., 667,* the court held that bonds owned by non-residents, although secured by mortgage on Kentucky real estate, and the trustee in the mortgage resided in Kentucky, were not taxable

in Kentucky, but that the *situs* of such bonds was the residence of the owners respectively.

It is unquestionable, therefore, that shares of stock of the non-resident shareholders of the national banks were not taxable in Kentucky as the "other personal property" of residents of Kentucky was taxable.

The Act of March 21, 1900, contemplates no distinction between resident and non-resident shareholders, and there is nothing in it to intimate the necessity of any inquiry into the residence of each or any shareholder on the first day of Septfember of any back year, much less to require the payment on only the shares (possibly a few) of the resident shareholders. On the contrary, the emergency clause in the statute declares the urgency of "State banks and national banks being taxed equally for all purposes," and not for national banks being taxed only upon the shares of those of their shareholders who are residents of the State from 1892 to 1900, and therefore taxable upon their lists of personal property.

Not only is the meaning of the *Act of March, 1900,* unmistakable, but in *Commonwealth v. Citizens' National Bank,* the court adjudged the imposition of penalties of *20 per cent.* upon the *bank* as delinquent during the years *from 1892 to 1900,* thereby recognizing that the act made the *bank* delinquent for back taxes. The case we have, then, is that because forsooth there were, or may have been, resident shareholders in Kentucky in the period from *1892 to 1900* (the number of such shareholders being immaterial, therefore the shares of national banks were taxable during those years, and national banks are accordingly delinquent because of the failure of all their shareholders to pay taxes during those years, and the Act of March 21, 1900, simply provides a new method of taxing what was previously taxable, and the banks may now be made to pay taxes on all their shares of stock for all of such years and pay penalties of *20 per cent.* upon the taxes for each year.

If this be allowed, then, as said by the learned judge of the Circuit Court (*Rec., p. 57*):

> "There is no limit to it, and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only be, but retroactively, for ten or twenty, or even fifty years back. Here would be a practical confiscation of such property, for public use."

a. No retroactive power such as is claimed here is given under section *5219 U. S. Rev. Stat.* That section is the source of all State power to tax National banks. (*Owensboro Nat. Bank v. Owensboro, 173 U. S., 664, 668*, and nothing like the power claimed can be gleaned from the statute. It authorizes the State to tax all the shares of National banks, provided that the tax be not a greater rate than that assessed upon "other moneyed capital" in the hands of individual citizens of the State, and that the shares of non-residents be taxed in the city or town where the bank is located and not elsewhere. *Section 5219* levies no tax; it merely authorizes the State to levy a tax. The section, too, contemplates only prospective taxes, for otherwise it would authorize the State's taxing the property of *non-residents* for past years, during which their property had not been taxable. Section 5219 was not enacted until a year or more after the passage of the *National Banking Act*, and, nevertheless, upon the construction required by our opponent's contention, that section must have given the right to the State to tax for a period before the passage of section 5219, the holders of the shares of National banks. This is not a just construction of the section. Not only does the statute bear no such construction, but the rule of construction is that statutes are prospective and not retrospective, unless the contrary clearly appears.

If section 5219 permits the State to make a retrospective assessment in a case like this, then the State might tax all shareholders of national banks for back years, although it had during such years jurisdiction over the residents only, and not over the non-residents. While the State may avail itself of the authority given by section 5219 to tax the non-resident shareholder of National banks, it can do so only by virtue of the act, and there is nothing in the act to give to the State the right to tax non-residents for years when they were not liable for taxation in the State.

The observation above quoted of the learned circuit judge (*Rec., p. 57*), applies with increased force to the present situation. To tax church property or other exempt property by retrospective legislation for ten or twenty or fifty years, would amount, indeed, to confiscation, and an infraction of the fourteenth amendment forbidding property to be taken without due process, but what must be said of the State statute assuming under the authority of *section 5219* to tax for ten or twenty or fifty years the shares of National bank stock of non-residents whose shares were never previously taxable in the State. To tax in a State property whose *situs* is elsewhere amounts to taking property without due process. *Louisville, &c., Ferry Co. v. Kentucky, 188 U. S., 385, 395.* And to tax by retroactive statute property not previously taxable for the period of time covered by the proposed tax equally offends the same principle. *Bellevue v. Peacock,* 89 Ky., 495.

In *Bellevue v. Peacock,* a street was improved by assessment of the cost upon adjacent property owners under the misapprehension of power in the town charter so to do. The absence of the power being adjudicated, the legislature attempted by retroactive statute to confer the power, but the act was condemned by the court as unconstitutional. The court said *p. 499:*

> "When the contract was entered into, the town had no authority, express or implied, to bind his property for the cost of the improvement, and when the statute, by virtue of which relief is now asked, was enacted, there was no pre-existing right as against him, or to look to his property. In short, the legislature, by this act, has attempted to afford a remedy against a party as to whom no right, legal or equitable, existed."

Accordingly, the statute was condemned, although enacted "through a laudable desire that justice should be done."

We, therefore, submit that the legislature was without the power to enact *section 3* of the Act of March *21, A. D., 1900* (*Rec., p. 53*).

b. The Act of March 21, 1900, for another obvious reason, does not merely tax what was already taxable viz., that the shareholders were already actually taxed, and the bank paid the tax under the "Hewitt Law" (*Rec., p. 5*).

c. The entire Act of March 21, 1900, however, is void upon another ground, to-wit, that it taxes National banks upon a basis, not the legal equivalent of the basis upon which State banks are taxed by the Act of 1892. The "Hewitt Law" had carefully taxed the shares of both National and State banks alike, and given each the same right to surrender rights held under Federal or State law in return for the same basis of taxation. The Act of 1892 abandoned this legitimate method of taxation of National banks, and undertook to tax their franchises and property. This Court condemned the Act of 1892, notwithstanding the State's claim of "legal equivalency," and *equivalency in fact,* of the two methods and nevertheless in the face of such condemnation by this court, the Act of March 21, 1900, perpetrated the same inequality condemned by this court by taxing National banks upon their shareholders'

shares and State banks upon their franchises and property, methods just adjudged not legally equivalent. The language of this Court demonstrates the invalidity of the *Act of March 21, 1900.* It said, *p. 676:*

> "It is however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are the equivalent to a tax on the shares of stock in the names of the shareholders, and therefore, do not violate the act of Congress."

The court then noting the incongruity of such claim further said:

> "Passing nevertheless this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.
>
> "To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court as to national banks," etc., etc.

After reviewing authorities this court said, page 680:

> "If the postulate upon which they (the authorities) necessarily rest be overthrown by saying there is an equivalency between the taxation of the property of the bank and the shares of stock in the names the shareholders it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed," etc., etc.

Upon legal equivalency this Court thus concluded, page 682:

> "There being, then, no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise, intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was, therefore, illegal.
>
> "Whilst this confusion suffices to dispose of the case we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and, therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute in question is too plain to require comment. The fact that it is not is illustrated by *Henderson Bridge Co. v. Kentucky, supra,* for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total amount of the capital stock, proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact were to rise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

The principles thus expounded settled the fate of the Act of March 21, 1900, for obviously there is no equivalency in law in the methods of taxation prescribed by that act and the Act of 1892—this court has, as just shown, emphatically said so—and there may be no equivalency in fact, for after deducting the State banks' United States government bonds its taxable assets may be far less than the value of the National banks' shares, although the National banks have the same amount of assets, including the same amount of such government bonds. At any rate the question of the right of taxation must not be reduced to "only a pure question of fact" (*p. 683*).

Van Allen v. The Assessors (*3 Wall., 573 L. ed. 18 p. 229*) as expounded in *173 U. S., 677*, seems conclusive of the instant question, for this court there said (*p. 677*):

> "Two issues were presented, one the assertion that the State banks were assessed on their capital and surplus, and, therefore, that stockholders in national banks were substantially discriminated against. This was held to be well taken; clearly, therefore, deciding that there was no equivalency between taxing the capital and surplus in the hands of the bank and taxing shares in the names of the shareholders, for if the two had been equivalent the decision would necessarily have been otherwise."

In Van Allen v. The Assessors, Mr. Justice Nelson said (*p. 581*):

> "The banks of the State are taxed upon their capital; and although the Act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which are exempt from state taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

It is thus demonstrated that the State has in repealing the "Hewitt Law" abandoned a system of taxation which it has as yet failed to replace with a valid law for taxing National bank shares.

d. It is now settled in Kentucky that retrospective taxation under Kentucky Statutes, *section 4021* is limited to the time when assessment could first have been made, *Chicago, St. L. & N. O. R. R. Co. v. Com. 24 Ky. Law Rep., 2124, 72 Southwestern 1119, and Com. v. Nute, Ibid. 2138, 72 Southwestern, 1090.* But irrespective of this, and of all that is said above on retroactive assessment, and even if there was no question of *res judicata*, and the Act of March 21, 1900, confessedly valid, yet the appellee and its shares of stock could not be assessed for taxation by the city of Covington for any time prior to the passage of that act. The settled law of Kentucky is, as declared by the Court of Appeals of that State in *Franklin County Court v. Louisville & Nashville R. R. Co.*, 84 Ky., 59 (syllabi):

> "Where there has been a failure to list property for taxation because of the decision of the court of last resort in the State that such property was not subject to taxation, the fact that the court subsequently decides that the law was misinterpreted will not authorize the collection of taxes on the property for the period during which the law as announced and understood did not require such property to be listed for taxation.
>
> "The Court of Appeals of Kentucky decided in 1868 that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for State revenue only. This case was followed by another to the same effect, and the law remained as declared by the Court of Appeals until 1876. So much of appellee's road as is in Franklin county was not assessed for county

taxes for the years 1868 to 1875, inclusive, and the county now seeks to collect taxes thereon for those years. *Held*, that while the court is of opinion that the law was misinterpreted, yet, as appellee complied fully with the existing law, as interpreted by the highest tribunal in the State, no more should be required of it."

The court in that case, at pages 64, 65, said:

"From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood, and in the absence of an express statute to the contrary, the then construction of the law must yet be held to be *the* law governing the acquisition of rights, or the performance of duties of that period.

"It is well settled that if a contract be valid under the law as previously expounded by the courts, and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared. (*Olcott v. The Supervisors, 16 Wall., 678.*)

"It is equally just that the same rule should apply as to duties required of them, such as the listing of their property for or the payment of taxation. Otherwise, they would not know when or how to act safely as to investment; and it would introduce much uncertainty and mischief into the business of the country. If they comply fully with the existing law, whether it be in *the form of positive legislative enactment or judicial interpretation, no more should be required of them.*"

This case was quoted with approval of the court in *Commonwealth for, etc., v. L. & N. R. R.*, 89 Ky., 139.

Applying the law, as thus declared by the court of last resort in Kentucky, to the facts in the case at bar, there can be no assessment of the shares of appellee's capital stock until after the passage of the Act of *March 21, 1900.*

The Court of Appeals of Kentucky, in June, 1895, decided appellee not liable for taxation by appellant, and with that knowledge, no act was passed by the legislature until March, 1900. It is true that in 1897 the Court of Appeals held contracts similar to appellee's not to exempt those particular banks, but it could well be said that, as these cases involved questions under the Constitution of the United States, there was no final decision therein until May, 1899, and not *until then* was the decision of June, 1895, by the Court of Appeals of Kentucky, finally overruled, and not until then, when this court had spoken, was it finally determined whether, under the Constitution of the United States, the contracts made under the Hewitt Law in 1886 could be revoked by the State. As so clearly stated by the Court of Appeals in that case, 84 Ky., page 65:

> "Rights were acquired, duties performed in accordance with the *then law as announced and understood,* and in the *absence of an express statute to the contrary,* the *then* construction of the law must yet be held to be *the* law governing the acquisition of rights or the performance of duties of that period."

The record in this case shows the full compliance by appellee with all the requirements of it, as *expressly* held by the Court of Appeals of Kentucky, and it shows the reduction of stock, payment of dividends, sale of shares, etc., during the time when it surely had the right to say that it was in every respect acting entirely within, and in accordance with, the law as declared to be.

II.

The next question is if the judgment of the Campbell Circuit Court, affirmed by the Kentucky Court of Appeals, adjudging in the bank's favor an irrevocable contract under the "Hewitt Law" exempting the bank from all taxation, except by that law imposed, is *res judicata* of that question, and prevents its relitigation here.

In the *Owensboro National Bank Case, 173 U. S., 648*, this court expressly withheld an expression of opinion upon the question, and in *Bank of Kentucky v. Stone, 88 Fed. Rep., 383*, Justice Harlan and Judges Taft and Lurton determined the question favorably to our contention, and their judgment was affirmed by this court by an equal division of the judges; *174 U. S., 799*. The learned circuit judge, in his opinion, declared his very strong impression that the question was concluded in our favor by this Court's decision in *New Orleans v. Citizens' Bank, 167 U. S., 371*, but felt "oppressed" by the thought that such a ruling might make inequality and injustice inasmuch as the irrevocability of the contract adjudged in our favor aforesaid has been subsequently denied by the highest court of Kentucky, and by this court, and he reserved the question. That a consideration of the consequences of *res judicata* if it be established, is inadmissible is well illustrated by *Stone v. Deposit Bank of Frankfort, 174 U. S., 1187*. Courts have no concern with the consequences when the law is plain. Here the law is plain. Indeed, our contention is irrefutable under the doctrine of *New Orleans v. Citizens' Dep. Bank (167 U. S., 371)*.

The learned circuit judge granted a preliminary injunction against back taxes, and retained the question as to taxes assessable under the *Act of March 21, 1900*, based upon the question of *res judicata* aforesaid, and that question was afterwards so elaborately and ably reviewed by

his successor. His opinion advances an argument in our favor perfectly unanswerable, but, for a reason totally inadequate, he stops short of the inevitable conclusion of his logic, and renders a judgment the reverse of it.

The learned judge declares (*Rec., p. 90*) that it is certain that in the suit in the Campbell Circuit Court, afterward affirmed by the Court of Appeals, the contract upon which we rely had been adjudged irrevocable; that both courts had delivered written opinions, and while the Circuit Court had placed its decisions on two grounds, "the latter (irrevocability of the contract) was the main ground of its action, and such was the only ground upon which the Court of Appeals based the affirmation of its judgment."

He next states our opponent's contention that this was a suit to enjoin the collection of taxes for years subsequently to the years taxes for which taxes were in litigation in the case adjudged, and his opinion against the contention. He then quotes this court's language in *Sou. Pac. Co. v. U. S., 168 U. S., 45*, that a right question, or fact distinctly put in issue and determined as the ground of recovery can not be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action but that the right question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the first judgment remains unmodified. That

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between

> the parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined."

The learned judge then declares that the principle so expounded had been applied in *New Orleans v. Citizens' Bank, 167 U. S., 371*, and *Baldwin v Maryland, 179 U. S., 220*, and quotes at great length the opinion of this court in the former case, couched in language at once unanswerable and decisive of our contention (*p. 91*). Extracts can not be made without marring the whole.

The judge then quotes from the latter case as follows:

> "There is no pretense that the taxes of 1895 stand in any other condition as to the matter of fact than the taxes of 1893 and 1894, which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conclusion in respect to taxes of 1893 and 1894. Johnson Street R. Co. v. Wharton, 152 U. S., 252; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S., 683; New Orleans v. Citizens' Bank, 167 U. S., 371."

The judge then recites that the doctrine of those cases had been applied by the Federal Court in Kentucky and by this court in cases exactly like our case (save in a particular thereinafter noted citing numerous decisions). (*Rec., pp. 90, 91, 92.*) That he is sustained to the letter appears from the language employed in *Bank v. Stone, 88 Fed. R., 393, viz.:*

> "The second question in the case is that raised by the averment of former adjudication. The case of the *City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct. 905*, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' Bank in New Or-

leans was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted, and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the District Court of New Orleans to enjoin the collection of a tax against it, on the ground that it had, by legislative contract, exemption from the same. The District Court sustained the claim, and enjoined the collection of the tax. A second suit brought to enjoin another year's taxes resulted in a similar judgment. Some years later the city of New Orleans having attempted to collect a tax for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the Circuit Court of the United States for the Eastern District of Louisiana, to enjoin the officers of the State and the city from proceeding to collect the tax, and set forth the former adjudicaton as a conclusive estoppel upon the defendants as to the point of previous litigation, namely, that there was a contract between the State and the bank forbidding such taxation. The causes of action were not the same in the case brought in the Federal Court and the cases adjudged in the State courts, because they involved taxes for different years; but the thing adjudged, to-wit, the existence and binding effect of the contract for the exemption for the particular taxation was the same. The Supreme Court of the United States in this case held that the City of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation, and held that the contract having been thus established the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a

suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White in delivering the judgment of the court, in a most elaborate opinion, said:

"'The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-books, and enforced by many decisions of this court. * * * It follows then that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.'"

After determining that the irrevocability of our contract was adjudicated by the Kentucky Court, notwithstanding the fact that the Circuit Court alleged two grounds for its conclusion (the Appellate Court having alleged only one), the learned judge below, stated the question treated by him as crucial, viz.: *If the Kentucky Court of Appeals would give to its judgment adjudicating the irrevocability of the contract the same effect which would be given to it by this court,* concluding upon authority of *Union, etc., Bank v. Memphis, 189 U. S., 71 (L. Ed. 47, p. 712)*, that unless it would do so, he must follow the rule of the State court, and disregard the rule of this court.

The learned judge next reviewed the Kentucky cases relied on by him, and collated, (*Rec., p. 96*) and concluded that the doctrine of the Kentucky Court of Appeals was that a judgment for taxes for one year was never *res judicata* of the liability for taxes for a different year; but we submit that his review of the Kentucky cases establishes clearly the reverse.

The learned judge, in his review of the Kentucky cases shows that the question now mooted was examined only in *Newport v. Commonwealth, 50 South. W. Rep., 845; 51 Ibid., 433,* and that the subsequent cases had simply referred to the discussion of that case as an exposition of the question, whenever raised. He then shows, we submit, conclusively, that the question was not adjudicated against us in that case, but distinctly and intentionally reserved. We can not state the Kentucky Court's position better than the circuit judge stated it below (*Rec., p. 97*).

He said that *Newport v. Commonwealth* was a suit by the State against the city to recover taxes under the Revenue Law of 1892, for the year 1894 on the franchise of the city to operate a water works; that among the city's defenses was a plea of *res judicata;* that it was pleaded that a suit had been brought against the city for taxes under the law of 1892, for the year 1893 on said franchise, and that said suit had been dismissed by the Circuit Court, and its judgment never reversed. That the city claimed the decision to be *res judicata,* but its claim was denied by the Appellate Court, and

> "It would seem that the judgment of the majority of the court was placed upon the broad ground that in no case and to no extent could a judgment in a suit as to one year's taxes be *res judicata* as to another year's taxes. Judge DuRelle in stating the opinion of the majority of the court based the holding on this reasoning, to-wit:

"'The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of these promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist regardless of former adjudications as to the validity of a different tax.'

And again:

"In our opinion it would be against public policy to hold that a judgment of a Circuit Court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years merely because counsel for the Commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the Commonwealth bound by the laches of its officers."

The learned circuit judge declares that *in response to a petition for a rehearing,* it appears that a minority of the judges desired an extension of the opinion,

"So as to include the qualification upon the general rule laid down as to the application of the doctrine of *res judicata* in tax cases, to-wit: 'But whether the State is bound by a former adjudication that there exists a contract exempting from taxation, or as to the construction of such a contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the Commonwealth exercising the highest of its sovereign powers—a power neces-

> sary to its very existence—and the same Commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But, it is not necessary in our judgment, to go into this question, nor even to decide that there is a difference.'"

So far, therefore, from the court in *Newport v. Commonwealth* holding that *res judicata* is not affirmable of any question in a tax case the court distinctly declares that if there be in a tax case a question of contract exemption and such question be adjudicated, whether or not the adjudication is conclusive in cases concerning taxes for subsequent years is a question which might be entirely different from the question before the court.

When, then, the court subsequently said, as quoted by the learned circuit judge (*Rec., p. 98*):

> "The plea of *res judicata* relied on has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for it to consider this question; it having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit, between the same parties, under the same law, for another year's taxes."

The court could not have meant that it had been "so frequently" decided adversely to the contention that *res judicata* could be affirmed of an adjudication of the existence of a contract for tax exemption, for the court in the *Newport* case had expressly declared not only that it was making no such decision, but that it was unnecessary to make such decision. But when the court said:

> "The plea of *res judicata* relied on has been decided so frequently adversely to the contention here made," etc.

And

> "Decided that a judgment by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit, between the same parties, under the same law, for another year's taxes."

The court must be assumed to have meant that it was decided in *Commonwealth v. Newport*, and subsequent cases simply that a judgment for taxes for one year was not *res judicata* of the State's right or the taxpayers' liability for similar taxes for subsequent years, and could not have meant that an adjudication of the existence or nonexistence, or of the validity or invalidity *of a contract exemption* from taxation in the first case could not be *res judicata* of such a question in the second case. In other words, the Court of Appeals must not be assumed to have misrepresented its previous decision, but must be taken to have recited it correctly.

In each subsequent case where the Kentucky Court's decision was against the plea of *res judicata* the decision amounted simply to an adjudication that a judgment for one year's taxes was not conclusive of liability of the taxpayer for a subsequent year's taxes, and in none of such cases did the Kentucky Court hold that an adjudication in one case of a *contract exemption* from taxation was not *res judicata* in a subsequent case.

When, therefore, we find the court declaring in *Newport v. Commonwealth* that there seems to be an an essential distinction between denying *res judicata* of tax liability in contests over taxes for subsequent years, and the adjudication of contract exemption from taxation, and find the learned circuit judge recognizing that such was the effect of the decision in *Newport v. Commonwealth*, his error in misconstruing the language of the Kentucky Court in the subsequent cases becomes obvious.

In the late case of *Frankfort v. Deposit Bank, 111 Ky., 950* (65 S. W., Rep., 110), reversed by this court, *191 U. S., 499*, the bank's counsel contended that the Federal Court's decision amounted to an adjudication of an irrevocable contract under the "Hewitt Law," and responding thereto the Kentucky Court said (p. *952*):

> "It is insisted by counsel for appellee that the Federal Court not only held that the judgment of the Franklin Circuit Court in this case was a bar to a recovery for taxes for the years 1895, 1896, 1897 and 1898, but also a bar to the right of the city to assert a claim for taxes for other years, as the judgment of the Circuit Court sustained the claim of the appellee that it had an irrevocable contract under the Hewitt Law. This position might be taken with some plausibility under recent rulings of the Supreme Court of the United States, if the judgment in question had remained unreversed. It has not only been reversed, but this Court, and the Supreme Court of the United States held that the bank did not have an irrevocable contract under the Hewitt Law."

The learned judge's review of the subsequent cases demonstrates that the question now presented was not in any of them involved, nevertheless apparently contrary to his own opinion, and expressly contrary to the ruling of this court, he concludes the rule of decision in the Kentucky courts to be against us, and dismisses our bill as to all taxes assessable subsequently to March 21, 1900; which we submit was an egregious error.

The learned judge seems to have been overwhelmed by this court's decision in *Union, &c., Bank v. Memphis, 189 U. S., 71* (*L. Ed. 47 p. 712*), but that case when the Tennessee rule of decision is understood, in no wise affects the instant case. The Tennessee rule is radically different from the Kentucky rule. The doctrine of the Tennessee Court is exactly what this court said in Newport v. Com-

monwealth, was not involved, and not decided. The Tennessee Court in the case which upon writ of error was decided by this court in *189 U. S., 71*, thus declares its doctrine.

> "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in City of New Orleans v. Citizens Bank, 167 U. S., 371, 17 Sup. Ct., 905,, in which it was held by a majority opinion, that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved." *46 Southw. Rep., 557, 560.*

Accordingly, in *Union & Planters' Bank v. Memphis*, this court declined to follow *New Orleans v. Citizens' Bank (167 U. S., 371)*, but deferred to the Tennessee rule exactly the reverse of this court's ruling. Kentucky has not followed the example of Tennessee in repudiating the doctrine of New Orleans v. Citizens' Bank, as to adjudication of contract exemptions, but in response to a petition for a rehearing in *Newport v. Commonwealth* expressly declared that the existence of the doctrine was not in issue, and has never departed from this position.

Accordingly, we may accept the doctrine quoted by the circuit judge in language of the Kentucky Court, to-wit:

> "That a judgment as to the validity of taxes in one year is not conclusive as to the validity of taxes on the same property for another year."

And nothing is asserted against our contention. Indeed such was adjudged in *Newport v. Commonwealth*, and nevertheless the court expressly refrained from deciding the question now under consideration.

Again, this court in *New Orleans v. Citizens' Bank* (*167 U. S., 371*), announced the doctrine compassed in the language just quoted from the Kentucky Court, *to-wit:*

> "That a judgment for taxes for one year is not *res judicata* as to taxes for a subsequent year."

So, in the *Newport case* the question now under discussion was expressly reserved, and in *New Orleans v. Citizens' Bank* this court emphatically, and after elaborate discussion decided it in our favor in language which can neither be added to nor subtracted from, but which is at once convincing.

We submit, therefore, that the sole basis upon which the circuit judge contrary to the ruling of this court, and apparently contrary to his own view as aforesaid, decided against us, viz.: That the Kentucky rule was against us, arose from an entire misapprehension of the Kentucky decisions, and that the question should have been decided in our favor upon the authority of *New Orleans v. Citizens' Bank.*

In what we have just said we have assumed *this Court* to have decided in *Union & Planters' Bank v. Memphis,* that it will follow the State Court's decision as to the effect of a State adjudication although opposed to this Court's view of such effect. We submit, however, that there is ground for holding exactly the reverse. This Court has often held that even upon a writ of error to the State Court upon a claim that a statute has impaired the obligation of a contract, it will itself determine whether or not the contract existed as claimed, and will not accept the State Court's decision of that question. If this court would treat as conclusive the State Court's decision as to the existence of the contract, it might as well treat as conclusive the State court's decision as to the impairment of the contract for the State Court could in every case fortify its decision be-

yond attack simply by holding the non-existence of the contract instead of holding that the contract existed but had not been impaired. The same rule ought to hold where the contract which it is claimed has been impaired exists by force of an adjudication—or in other words is a contract of record—as in the case of any other contract. In the instant case, the contract which we claim was impaired by the Act of March 21, 1900, is the contract of record manifested by the record of the Campbell Circuit Court and Kentucky Court of Appeals. When we assert this contract's impairment, and the existence of such contract is denied by the city of Covington, the question of its existence would seem to be as much for this court's decision as a question of the existence of any other contract which is claimed to have been impaired by an act of a State legislature.

The doctrine of *New Orleans v. Citizens' Bank*, upon which we rely, is re-enforced by the decision of this Court in *Deposit Bank v. Frankfort, 191 U. S., 499*, where this Court gave the bank the benefit of the adjudication in its favor of the question of its exemption after the opinion had been expressed as well by this court as the Kentucky court, that the original claim of exemption was unsound.

Upon another principle the Circuit Court erred in applying what it supposed to be the Kentucky rule, viz., that all the Kentucky decisions invoked were made after the judgment of the Campbell Circuit Court aforesaid. In *Douglass v. Pike County, 101* U. S., *677*, this court held that it would not reconsider upon a State court's change of judicial decision, its previous ruling based upon the State court's previous ruling, saying (*p. 686*):

> "We are, then, to consider whether under these circumstances, we must follow the later decision to the extent of destroying rights which have become vested under those given before. As a rule we give the construction which the highest court of a State

has given a statute of a State as part of the State, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. The language of Mr. Chief Justice Taney in Rowan v. Runnels, 5 How., 134, expresses the true rule in this subject. He said, page 139: 'Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court were lawfully made.' Afterward, in the Ohio Life Insurance & Trust Co. v. DeBolt, 16 How., 416, the same learned chief justice, after reiterating what he had before said in Rowan v. Runnels uses this language: 'It is true the language of the court in that case is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.'"

We respectfully submit that the decree of the Circuit Court should be affirmed upon the appeal of the city, and reversed upon our appeal, which is accordingly prayed.

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